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elni REVIEW

Editorial

The aim of the Environmental Impact Assessment (EIA) process is to ensure that projects which are likely to have a significant effect on the environment are assessed in advance so that people are aware of what those effects are likely to be. The review process conducted by the Commission of the 25 year-old "EIA-Directive" identified its potential strengths and weaknesses. Set against this background, the current edition of the *elni review* is dedicated to legal challenges in the implementation of Environmental Impact Assessment.

Firstly, an overview of challenges and perspectives of the EU Environmental Impact Assessment Directive is given by *Sergiusz Urban and Jerzy Jendrośka* in their review of the elni conference held on May this year in Wroclaw which examined the proposed changes of the EIA Directive in the light of practical experience gathered up to now (Member States experience, jurisprudence of EU courts and international bodies) and views expressed in literature.

Subsequently, the Appropriate Impact Assessment and Authorisation Requirements of Plans and Projects likely to have significant impacts on Natura 2000 sites are examined by *Nicolas de Sadeleer*. The aim of his article is to shed light on the procedural requirements of the Habitats Directive, which are a key provision for implementing the EU's system of protecting and preserving biological diversity in the Member States.

The third article is written by *Eckard Rehbinder* and argues for (suitable) criteria for the assessment of the likely environmental impacts of projects which are subject to the EIA, focusing on the assessments carried out by the competent authority and the assessment elements of the environmental report and the consultation of interested authorities.

The final article which concentrates on EIA is by *Gijs Hoevenaars* and analyses the quality review of EIAs and Strategic Environmental Impact Assessments (SEA). With regard to the current discussions in Europe on this subject, this article provides an insight into Dutch experiences with the quality review of EIA and SEA.

Further articles are dealing with current EU legal issues.

The article of *Ludwig Krämer* analyses the practice of access to documents within the EU on the basis of several examples of legislation, and its use and interpretation by the EU Courts of Justice in the area of access to environmental information.

In a further article *Lorenzo Squintani* discusses the practice of national bodies exceeding the terms of European Union directives when implementing them into national law. He analyses certain provisions of the Directive 2008/98/EC on waste in order to understand the functioning of the Dutch policy on so-called "gold-plating".

Finally, *Peter Kremer* examines whether mercury depositions which are emitted by Coal-Fired Power Stations are in line with the Industry Emission Directive and the Water Framework directive. Furthermore, he analyses what instruments are available under prevailing law to prohibit the construction of new coal-fired power stations and to make their approval subject to judicial review.

We hope you enjoy reading the journal.

Contributions for the next issue of the *elni Review* are very welcome. Please send contributions to the editors by mid-February 2014.

Claudia Fricke/Martin Führ

December 2013

Pre-announcement

elni forum 2014

February 2014
in Brussels, Belgium

The elni forum will take place in February 2014, at EU Liaison Office of the German Research Organisations (KoWi), 8th Floor, Rue du Trône 98, 1050 Brussels.

The elni forum 2014 will offer the opportunity to discuss environmental footprint issues in environmental law from different point of views:

"Environmental Footprints–
Key issues and practical experiences"

With an introduction by

Arjen Hoekstra, *Professor for Water Management and co-founder and scientific director of the Water Footprint Network, University Twente, Netherlands.*

Imola Bedo*, Production Coordinator DG Environment, European Commission, Brussels.*

Arjen Hoekstra presents key issues on the concept and developments on the water footprint. Imola Bedo will provide the point of view of the EU green products policy (PEF, OEF, PCRs, product passport). Furthermore there we will be the possibility to discuss the topic from an NGO and business perspective.

Further information to follow soon on www.elni.org

The EU, access to environmental information and the open society*

Ludwig Krämer

1 Openness and transparency in the EU Treaties

The Treaties of Lisbon which entered into force at the end of 2009, underlined no less than five times that the European Union (EU) adheres to the principles of an open society[1]. While the wording of Article 1(1) TEU constituted a repetition of the text which already existed in Article 1 of the EC Treaty prior to 2009, the text of the other four provisions quoted is new. It underlines the commitment of the authors of the Lisbon Treaties to an open EU society. This commitment is further strengthened by the re-evaluation of the EU Charter on Fundamental Rights of 2000[2], which obtained, through the Lisbon Treaties, the same legal value as the Lisbon Treaties themselves and which gave EU citizens a fundamental right of access to information[3], stressing that the EU "placed the individual at the heart of its activities" [4]. Access to information on the environment plays a particularly important role in environmental policy, because the environment has no voice: eagles and fish, whales and foxes cannot defend their interests in discussions, and future generations of humans are in the same position[5]. For this reason, discussions and negotiations on the protection of the environment, on the balancing of ecological with other interests and on the effectiveness of the efforts to prevent further degradation of the environment in Europe need the public place as forum. When such discussions take place in the remoteness of administrative offices or behind closed windows, the environment almost always is the loser; only when the discussions are transparent and public, is there a chance that the considerations of the protection of the environment prevail over vested interests. This aspect links the citizen's right of access to information which is directed to public administration, to the specific concern for the environment.

Indeed, data on the environment in our society are collected, processed and distributed by the administration[6]. It is the administrative bodies which take its decisions that affect the environment on the basis of data collected from public and private sources or by themselves. And as with regard to the numerous administrative decisions – on specific cases or on more general issues[7] – which are taken every day, the Parliaments are not involved, the administrations have a particular responsibility with regard to environmental information: "Public authorities hold environmental information in the public interest"[8].

In practice, it is alarming to see how much expert opinion, research results, studies, data and facts are withheld from the interested public in EU environmental matters. Numerous data are stored and monitored by the EU administration without being made public – as if the environment were the private property of the administration and not of everybody. Administrative inertia, professional or commercial secrets, the power which is given to superior knowledge, all these contribute to the present "mafia of silence". What is worse, some groups, representing organized or vested interests, have informal means of access to data which are in the hands of the administration[9].

2 The open society

The term "open society" was apparently first used by the French philosopher Henri Bergson, who used it, however, in a religious context. It entered into political discussions following the publication, in 1945, of the book *The open society and its enemies* by

* This article was first published under the same title in the Journal of the Academy of European Law on 24.10.2013.

1 See Treaty on European Union (TEU), Article 1(1): "This Treaty marks a new stage in the process of creating an ever closing Union among the peoples of Europe, in which decisions are taken as openly and as closely as possible to the citizen". Article 9(3) TEU: "Decisions shall be taken as openly and as closely as possible to the citizen". Article 11(2) TEU: The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society". Treaty on the Functioning of the European Union (TFEU), Article 15(1): "In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible". Article 298 TFEU: "In carrying out their mission, the institutions shall have the support of an open, efficient and independent European administration".

2 OJ 2000, C 364 p.1.

3 Charter (fn. 2, above), Article 42: "Any citizen of the Union... has a right of access to European Parliament, Council and Commission documents". This right is repeated and elaborated in Article 15(3) TFEU.

4 Charter (fn.2, above), Recital 2.

5 "Under the traditional principles and procedures, only actual interests are voiced, trying to influence the decisions and request consideration. Public authorities are obliged to be responsive to them, and this is how the respect of rights is ensured in practice (in contrast to their abstract recognition). The "future" is not represented in any committee; it is not a power which can intervene in the discussions. The non-existent has no lobby and the unborn are powerless" (Hans Jonas, *Das Prinzip Verantwortung*. Frankfurt 1984 (author's own translation).

6 For the EU see in particular Regulation 1210/90, setting up a European Environment Agency, OJ 1990, L 120 p.1. The Agency, has, besides its staff of some 120 persons, a network of more than 2000 officials in the EU Member States which assist in collecting and processing data on the environment. No other body in the EU, public or private, has this capacity.

7 I am thinking of plans and programmes, decisions to authorize the spreading of products and GMOs, decisions on infrastructure projects, etc.

8 Aarhus Convention on access to information, public participation in decision making and access to justice in environmental matters, Aarhus 1998, Recital 17 (emphasis added). The EU and all EU Member States adhered to the Convention which is thus binding on the EU and on the Member States (see Article 216(2) TFEU).

9 See L. Krämer, The open society, its lawyers and the environment. Journal of Environmental Law 1989, p.1.

the philosopher Karl Popper, who was brought up in Vienna, forced to emigrate to New Zealand and then lived in the United Kingdom [10]. Subsequently, the concept of "open society" gained very considerable influence in the policies of both sides of the Atlantic, the United Nations and worldwide.

Popper distinguished between the closed and the open society. In the closed society, some parts of the group (priests, leaders, churches, classes such as the nobility etc)[11] claim to know what is right and what is wrong. They surround the knowledge with magical attributes in order to shield the knowledge from the majority of the population. Decisions are only taken by the members of the group who "possess" the truth and criticism of these decisions is not accepted. Popper saw typical elements of such a closed society in Platon's ideal state, in Sparta's society, in Hegel's concept of Prussia and in the modern systems of Nazism, fascism and bolshevism.

The open society concept starts from the recognition that neither science nor man-made laws can contain an absolute truth, because nobody can anticipate the future with certainty. Policy-makers – legislators in particular – should learn from natural science that progress can only be achieved by an approach of trial and error: where legislation reveals itself effective, it should be continued, where this is not the case, it should be improved. As nobody holds the truth, it is necessary that laws and political decisions are discussed in public, criticized and exposed to broad considerations of their advantages and disadvantages. As a consequence citizens need to develop critical thinking; however, this also implies that the laws and decisions are allowed to be discussed in public. For an open society administrations therefore need to open up, favour and promote the dialogue with civil society and try to promote the public discussion as far as possible. The more discussions on law and policy in a society are open, critical and controversial and take place with the participation of citizens, the more that society may be considered an "open society".

And the more decisions are taken away from public discussion, in confidential meetings and decided by the (administrative, political or other) experts, the more a society is closed. The power which knowledge grants to those who know, is not shared, but is "jealously" kept within the privileged group which maintains, by this way of proceeding, its advance in know-how and its governing power.

It becomes clear from this outline of the open society concept that a closed society is not compatible with democracy, with the rights of individuals and with transparent decision-making procedures. There can be no trial-and-error concept in a closed-society system because those who hold the power hold the truth and thus do not err. A critical discussion on draft decisions is not desirable, because the truth is already known to the decision-makers and would thus only generate confusion.

If one remembers the basic concept of an open society, as originally developed by Popper and later further discussed, fine-tuned and evolved by others, the terms and phrases of the EU Treaties on "openness" and "transparency" become clearer. Indeed, the concept of the Lisbon Treaties is that of an open society, where the EU administration is transparent, actively engages in a dialogue with civil society and representative associations, tries to make public preparatory documents and other papers to the extent possible and favours with all means a discussion at EU level which is as broad as possible. In contrast to this, the "diplomatic way", where discussions and negotiations are led in confidentiality, away from public awareness and by avoiding controversial exchanges, is the typical expression of a closed society. It may be concluded that the model of a closed society does not find any support in any of the provisions of the Lisbon Treaties or of the EU Charter on Fundamental Rights.

3 Transparency and openness in practice

No attempt will be made here to examine in general the extent to which the EU institutions follow, in their daily practice, the model of an open, democratic society. Rather, it will be shown by a number of examples in the area of environmental information[12] how EU legislation, its use in practice and its interpretation by the EU Courts of Justice, are closer to the concept of a closed society than to an open society.

(1) Before the Commission submits a proposal for legislation to the other institutions, it makes an impact assessment which assesses the economic, social and environmental impact of the proposal[13]. The impact assessment is published together with the corresponding Commission proposal. This means that no information and participation of civil society or interested groups on the draft impact assessment can take place or be incorporated. The Commission keeps the impact assessment and its results confidential: knowledge gives power.

The Commission's impact assessments have a very considerable influence on the Commission's legislative proposals themselves. As the present Commission's priorities are "economic growth and jobs", environmental concerns play a more marginal

10 Quoted from: Karl Popper, *The open society and its enemies*, London/New York 1986.

11 Popper uses the word "tribal".

12 A number of examples also refer to areas other than environmental law and policy. However, the absence of transparency is particularly felt in the environmental sector, due to the fact that the environment has neither a voice nor a (powerful) lobby.

13 See Commission, Impact Assessment Guidelines, SEC (2009) 92.

role and proposals for environmental measures are rejected by the Commission itself, unless it can be proven with econometric data that the specific environmental measure is beneficial for the EU economy. This approach led, for example, to the absurd situation that the Commission made, in 2012, a proposal for a "Seventh EU Environment *Action* Programme" for the period 2014 till 2020, without proposing a single concrete action[14].

(2) For the EU legislative procedure, the EU Court of Justice ruled that the opinions of the Legal Service of the Council on a specific piece of legislation should normally be made available to the public; there is an overriding public interest in this, as the disclosure "increases the transparency and openness of the legislative procedure and strengthens the democratic right of European citizens"[15]. The Court made the following remark which may be considered as a blueprint of the concept of an open society:

"As regards, first, the fear expressed by the Council that disclosure of an opinion of its Legal Service relating to a legislative proposal could lead to doubts as to the lawfulness of the legislative act concerned, it is precisely the openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which can give rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole". This judgment, though, did not lead to a change in the Council's position: when an environmental organization asked for access to the opinion of the Council's Legal Service on the proposal for amending Regulation 1049/2001[16], the Council refused disclosure, invoking the particularly sensitive nature of the opinion and repeating the same arguments which the Court had rejected in the Turco case of 2008[17]. Generally, the Council and the Commission refuse access to the opinion of their Legal Services in legislative matters.

(3) Commission proposals for legislation are discussed in Council working groups, where all Member States and the Commission are represented. The meetings of the working groups are not public[18]. The minutes of the working groups contain the comments which the different Member States made on the provisions of the proposal, as well as suggested or agreed amendments to the text. The minutes are not made public. When a private organization wanted to see the minutes, they were disclosed, but the names of the commenting Member States were deleted. The General Court held this lack of transparency to be illegal: "Openness [in legislative procedures] contributes to strengthening democracy by enabling citizens to scrutinize all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights"[19]. As the judgment was appealed, the Council practice did not change.

(4) The legislative procedures at EU level are laid down in Articles 293ss. TFEU. In order to accelerate the legislative procedure, so-called "Trilogue" meetings have taken place more and more frequently in recent years. These are meetings at which a delegation of the European Parliament, of the Council and of the Commission meets informally in order to reach a compromise on a legislative proposal. Such meetings may take place before or after the European Parliament has given its opinion on the Commission proposal. The minutes of the meetings are not published or otherwise disclosed; press releases are also not published. Only some members of the European Parliament, the elected EU institution and co-legislator, are informed of the discussions; the rest only learn about the outcome of the negotiations when the trilogue meetings have been completed. This trilogue procedure constitutes a clear deviation from Articles 293ss TFEU which is not covered by the Treaty provisions. The confidentiality of the procedure contradicts the elementary principles of legislative procedures which have developed over the last two hundred years in Europe and worldwide.

(5) When an environmental organization wanted to have access to a letter which the former German Chancellor Schröder wrote in the year 2000 to the Commission in order to have the partial destruction of a natural habitat by a private airport accepted, it was refused access to that information. And the General Court found in 2011 that disclosure of that letter would undermine the economic policy of Germany[20]. The Court found reasons not to examine the question of whether the long period of time that had elapsed between the writing of the letter and the judgement (eleven years) makes the argument of any threat to the German economic policy obsolete. And it did not see that the EU and Germany had adhered to the Aarhus

14 Commission, COM(2012) 710. How can one seriously assess, in 2012, the impact of an action which is envisaged for 2019?

15 Court of Justice, cases C-39/05P and C-52/05P, Sweden and Turco v. Council, judgment of 1 July 2008, paragraph 67. See also in the same sense paragraph 59, quoted hereafter.

16 Regulation 1049/2001, on access to documents, OJ 2001, L 145 p.43. Commission proposal for amendment COM(2008) 229.

17 General Court, case T-452/10, ClientEarth v. Council. The case is pending.

18 See Article 16(8) TEU: "The Council shall meet in public when it deliberates and votes on a draft legislative act". The Council does not apply this to working groups, though the essential work is carried out there.

19 General Court, case T-233/09, Access Info Europe v. Council, ECR 2010, p.II-1073. The judgment was appealed by the Council, see C-280/11P.

20 General Court, case T-362/08 IFAW v. Commission, ECR 2011, p.II-11.

Convention[21] which did *not* allow the withholding of environmental information with the argument that it would undermine the economic policy of a Member State; under EU law, an international agreement which is ratified by the EU, prevails over EU regulations or directives[22].

(6) In 2006/2007, the car company Porsche lobbied the German Commissioner for industrial affairs on question of CO^2 emissions for cars. An environmental organization wanted to see these letters. The Commission refused disclosure, arguing that the disclosure would undermine the commercial interests of Porsche. The European Ombudsman examined the case and found that the Commission had not explained properly why it refused to disclose the letters, and this constituted a case of maladministration; in a special report to the European Parliament, the ombudsman furthermore complained of a lack of sincere cooperation on the part of the Commission[23]. The Commission saw no reason to follow the Ombudsman and disclose the letters. In 2011, an environmental organization again requested access to these letters. Just before the organization stepped up its efforts further, the Commission released the documents, five years after the initial request.

(7) The European Food Safety Authority (EFSA) issued a guidance document on the use of pesticides. An environmental organization wanted to know which experts had advised EFSA in the preparation of the guidance and what their comments had been. It suspected that EFSA had mainly chosen experts who were close to industry interests. After much discussion, the EFSA disclosed the names and also the comments, but refused to disclose which expert had given which comment. It argued that its decision-making process would be undermined and that the privacy of the experts had to be protected. The case is pending in court[24].

(8) An environmental organization wanted to know from the European Chemicals Agency (ECHA) the name and contact details of the producers or distributors who put certain dangerous chemicals on the EU market and the tonnage of certain dangerous chemicals which they place on the EU market. ECHA refused, arguing that such information affected the commercial interests of the companies in question, as their market position would become known. The case is pending in court[25].

(9) An environmental organization wanted to see a literature review document which the Commission services had prepared on the bioenergy derived from biomass. The Commission refused disclosure. Only when the organization appealed to the General Court did it give in and make the document available, several months after the original application[26].

(10) The Commission regularly contracts out so-called conformity studies in the environmental field. These studies are realized by private contractors. They examine the transposition of an environmental directive into the national legal order of each Member State. The studies are carried out without the participation, often even without the knowledge, of the national authorities. They contain a disclaimer, according to which the Commission is not responsible for the content of the study which does not reflect the Commission's opinion. The studies are not made public. An environmental organization wanted to see the studies, arguing that the citizens had a right to know whether and how their State and other States complied with their obligations under EU law. The Commission only granted access to those studies in which the contractor had found that the national legislation fully complied with EU law. For the rest, it argued that the studies were part of the infringement procedure under Article 258 TFEU which the Commission might initiate at a later stage. The case is pending in court[27].

(11) When the Commission finds that a Member State infringes EU law, it sometimes[28] starts infringement proceedings against that Member State. The procedure consists of the dispatch of a letter of formal notice, the dispatch of a reasoned opinion and the application to the Court. All three steps require a formal decision by the college of the Commissioners. The Commission releases public information on the dispatch of a letter of formal notice, when the infringement concerns a case where a Member State failed to communicate its transposing legislation. Also it sometimes issues a press release following the dispatch of a reasoned opinion or its decision to apply to the Court. The

21 Aarhus Convention (fn.8, above). The EU adhered to the Convention by Decision 2005/370, OJ 2005, L 124 p.1.

22 See Court of Justice, case C-344/04 IATA and ELFAA, ECR 2006, p.I-403: "Article 300(7) EC [now Article 216(2) TFEU] provides that 'agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'. In accordance with the Court's case law, those agreements prevail over provisions of secondary Community legislation".

23 European Ombudsman, case 0676/2008/RT, decision of 7 July 2010, special report of 24 February 2010.

24 General Court, case T-124/11, ClientEarth v. EFSA. The case is pending.

25 General Court, case T-245/11, ClientEarth v. ECHA. The case is pending.

26 General Court, case T-56/13, ClientEarth v. Commission.

27 General Court, case T-111/11, ClientEarth v. Commission. The case is pending.

28 Though the wording of Article 258 TFEU indicates that the Commission is obliged to start infringement proceedings and only has discretion as to whether to appeal to the Court of Justice or not, the Court itself has stated that the Commission's discretion to initiate or not such proceedings cannot be controlled by the Court, see Court of Justice, case C-247/87 Star Fruit Company v. Commission, ECR 1989, p.I-291; case C-422/97, Sateba v. Commission, ECR 1998, p.I-4913. In my opinion, this interpretation is not legally correct: the question of whether the Commission respects, for example, the principles of non-discrimination and of equal treatment, should be capable of being controlled by the Court. The "acte de prince", i.e. decisions by public authorities which are not controlled in law, is not democratic and has no right of existence in an open society.

letters of formal notice and the reasoned opinions themselves are not made public. The Commission justifies this on the basis of some Court decisions – which date from 1999, thus a long time before the Lisbon treaties underlined the commitment to "openness", as mentioned above – and the need to maintain an situation of mutual trust with the Member States and to create a favourable atmosphere, in order to reach compliance with EU (environmental) law as quickly as possible. Moreover, the purpose of investigations and enquiries would be undermined by publication. It is submitted that the atmosphere of "mutual trust" and loyal cooperation is only a pretext in order to prevent the disclosure of the Commission decisions. The Commission's practice of selected press releases shows that the Commission itself is not very convinced of the atmosphere of mutual trust, and the occasional releasing of information, mentioned above, is a purely internal, rather arbitrary decision by the Commission which finds no support whatsoever in the Treaties. There is no legitimate reason why the public should not be informed of letters of formal notice and reasoned opinion; disclosure of these documents might even accelerate compliance of the Member States in question with EU law. The procedure under Article 258 TFEU, unchanged since 1958, is neither an investigation nor an enquiry procedure [29] and citizens have a very legitimate interest to know whether their State or other Member States comply with their obligations under EU environmental law.

(12) Under Regulation 1049/2001 [30], the EU institutions are obliged to answer a request for access to documents within fifteen working days. When very long documents or a large number of documents are requested, they may extend this period by other fifteen working days. Not answering within the set periods is considered a refusal of granting access (implied answer).

The European Commission practically *always* exceeds these delays, without giving any justifiable explanation. It found support in this with the General Court. That Court decided that a delayed express answer remained valid and replaced the implied negative answer. Any application to the Court had to be addressed against the express answer, not the implied answer - though the Court allowed the change of the plea, when first an implied decision had been appealed which was later replaced by an express decision. This Court practice deprives the provision of Regulation 1049/2001 on the delays, within which an answer has to be given, of any useful effect. There is no sanction against the Commission[31]. Very often the applicant needs a specific document or specific information immediately, and a disclosure after several months – in the case of the Porsche letters mentioned above, after five years –– [32] is of no or very limited interest to the applicant. It would have been possible for the Court to declare that exceeding the delay constituted a negative answer which could not be repaired. This was suggested to the Court[33], but rejected.

(13) In case T-278/11 [34], an environmental organization requested access to some documents. The Commission did not decide in the time requested by Regulation 1049/2001, but promised three times that an answer would be given as soon as possible. Finally, the organization set a final deadline and when it received no answer, it applied to the General Court. Then, the Commission made an express decision. The Court considered that the application should have been brought, according to Article 263(6) TFEU, within two months after the implied decision. The organization had waited too long; its action was held inadmissible.

This means that the attempts of an applicant to accommodate the administration are sanctioned. Either he or she goes immediately to the Court or the applicant's action is inadmissible.

(14) In the same case T-278/11, the substantive issue was that the Commission intended to approve certain schemes for biofuels which were applied in third countries, provided that these schemes complied with the sustainability criteria laid down in Directive 2009/28[35]. The environmental organization wanted to see the schemes for which approval had been requested in order to be able to comment on whether the organizers of these schemes were reliable, had experience and had acted previously in this area. The application of access to documents was made in October 2010. The substantive answer from the Commission was given in September 2011, two months after the Commission had taken its decisions on the approval of different schemes[36]. In this way, the information obtained was completely useless for the environmental organization.

(15) Under Article 11 of Regulation 1049/2001, each EU institution shall provide public access to a register of documents, "in order to make citizens' rights under this Regulation effective". For each document, the

29 See L. Krämer, Access to letters of formal notice and reasoned opinions in environmental law matters. European Environmental law Review 2003, p.197.

30 Regulation 1049/2001 (fn. 16, above).

31 In one of its decisions, the General Court indicated that another claim for damages might be introduced. However, an environmental organization is hardly able to prove damage when it could not pursue its statutory objectives, due to the fact that it could not accede to information.

32 See also the examples 6 to 10 above.

33 See, for example, General Court, case T-494/08 Ryanair v. Commission ECR 2010, p.II-5723.

34 General Court, case T-278/11, ClientEarth v. Commission, order of 13 November 2012.

35 Directive 2009/28 on the promotion of the use of energy from renewable sources, OJ 2009, L 140 p.16.

36 Commission Decisions 435/11 till 441/11 of 19 July 2011, OJ 2011, L 190 p.73ss.

register shall contain a reference number, the subject matter, a short description of the content and the date on which the document was drawn up or registered. The registers were to be operational by 3 June 2002.

The Commission does have a register of documents. However, this register only lists those documents which are subject to a decision by the Commission as a college. All documents which reach the different Directorates-General of the Commission, letters, studies, reports etc, are not listed. Persons outside the Commission do not know which documents exist and to which they could request access. Other EU bodies such as ECHA or EFSA do not have a register of documents. In a recent decision, the General Court stated that the absence of a register infringed the right of citizens to access to information and that the citizen, as part of his or her right of access to information, also had a "right of access to the register" [37]. It might be that this judgment will progressively lead to a change in the Commission's practice, though the 10-year delay of making Article 11 of Regulation 1049/2001 really effective does not inspire optimism**.**

4 Concluding remarks

The examples discussed above constitute only a small fraction of all the cases in which the EU institutions delay, refuse and restrict access to information and participation in the decision-making process by citizens [38]. They appear determined to stick to the power which knowledge confers and ignore that – let it be repeated – public authorities hold information on the environment in the *public interest*, not in their own interest. The difficulty to obtain information, the delays and bureaucracies involved act as a powerful deterrent for citizens. The internet and other modern communication techniques would make it easy regularly to convey data and information on the environment and thereby share it with civil society. Yet, for this, the EU administrations would need to realize and put into practice that they exist to serve the citizen. It is regrettably wrong and a waste of time and money that citizens have to go to court to obtain access to documents [39].

The conclusion is that the concept of "open society", so forcefully underlined by the Lisbon Treaties, has not yet arrived at the EU institutions. They continue to act as if there is no difference between the time before and after the Lisbon Treaties. There are some positive signals sent out by judgments of the General Court [40] and the Court of Justice which give hope that these courts will progressively move the EU institutions away from the concept of a closed society. However, the move towards an open society should not be driven by the Courts alone. Citizens and civil society as a whole are in desperate need to see the EU moving to more openness, transparency and democracy. They see less and less sense in participating in European elections only in order to be largely excluded, for the years between elections, from really participating in the EU decision-making process. In this regard the environmental sector, on which this contribution concentrated, is only *pars pro toto*, i.e. a part taken for the whole.

No reasonable person would claim that the Wikileaks concept of openness and transparency should be the guideline for the EU institutions. Public administrations need a space where they can reflect, discuss among themselves and reach decisions without too much interference from outside. There will therefore always be a tension between the request for more openness and transparency and the concern for administrative efficiency and effectiveness. However, at present, the balance at EU level is, in the environmental sector, clearly biased in favour of confidentiality, secrecy and non-transparency. This situation is all the more inacceptable given that access to information and participation in decision-making in the environmental field is much easier for vested interest groups – car and chemicals industries, agricultural groups, transport and energy industries, etc. – than for citizens and civil society. An open, transparent society requires and open and transparent administration. At EU level, we are not there yet.

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37 General Court, case T-392/07, Strack v. Commission, judgment of 15 January 2013.

38 The examples concentrated on the Commission and the Council. The following remarks therefore refer particularly to them, though the term "institutions" is used.

39 See the examples 6 to 10 and 14, above.

40 The judgment mentioned under no.5 above appears to be a political judgment which does not put into question the general tendency.

Imprint

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Öko-Institut e.V.
Institut für angewandte Ökologie
Institute for Applied Ecology

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.
The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.
The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

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The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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I·E·S·A·R
Institute for Environmental Studies and Applied Research
FH Bingen

The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

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sofia

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The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.
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